

IMPACT OF THE WTO ON EC AND NATIONAL LAW

DOPAD PRÁVA WTO NA PRÁVO ES A NÁRODNÍ PRÁVNÍ ŘÁD

KATEŘINA ŘÍHOVÁ, MARTIN ORGONÍK

Faculty of Law, Masaryk University

Abstrakt

Tento příspěvek je rozdělen na dvě části. První z nich přibližuje základní podstatu ES a WTO a jejich srovnání. Dále je pozornost věnována vzájemnému vztahu a ovlivňování těchto dvou obchodních velikánů. Druhá část se věnuje projevům práva WTO v právním systému ES a v národním právu. Kapitulu uzavírá stručné nastínění pozice práva WTO v hierarchii práva ES a národního práva.

Klíčová slova

Světová Obchodní organizace, Evropská Společenství, Evropská Unie, Všeobecná dohoda o clech a obchodu, mezinárodní obchod, liberalismus, ochranářství, projevy práva WTO v národním právu, národní právo, mezinárodní právo, Doložka nejvyšších výhod, Národní režim

Abstract

First part of the article deals with the general comparison and contrast between the ES and the WTO. Also the correlation and influence of these two trade giants is examined. Second part of the article discourses with the domestic impact of WTO Law. Exactly the impact of WTO Law to EC and national law is described and as well the position of WTO law in hierarchy of EC law and national law.

Key words

World Trade Organization, European Communities, European Union, General Agreement on Tariffs and Trade, international trade, liberalism, protectionism, the domestic impact of WTO law, national law, international law, Most Favoured Nation Treatment, National Treatment

I. Introduction

The German nineteenth century economist Friedrich List famously wrote:

“Gedanken sind zollfrei”

He wanted to tell, that thoughts are not subjects to customs controls. That could be truth, but the expression of thoughts, ideas and another action, which ends in creation of goods or services, is surely affected by the existence of state borders. The development of international trade started many centuries ago and mankind was a witness of various kinds of trade protectionism. After the second world war was trade liberalization perceived as inevitable and white flag was seen also for free trade movements. Free trade expresses the economic inter-dependence of countries around the globe and a greater awareness of the need to promote and distribute wealth resources at a global level¹. Free trade was also a promise for economic growth.

Let's compare doing international trade to the football game. There is a competition, seeking for goals and team work. The players of international trade are individuals, states, big wide spread organizations and states associated by regional trade agreements. The representatives of last two named will be for this article WTO and EC. Both are independent international organizations, but influence each other a lot. EC lawyers have been used to reflecting on the fundamental ways in which the legal systems and governance of its component states have been affected by their membership of the European Union.

Another important question is how in substantive and procedural terms the process of political and legal decision-making in the European Communities is affected by the fact, that EC are the member of the WTO. The biggest issues can be described as²:

- question of the exact legal status and effect of WTO norms within the European legal order
- how particular EC policies are affected by the provisions of the relevant agreements of WTO

¹ Maduro, M. Is There Any Such Thing As Free or Fair Trade? A Constitutional Analysis of the Impact of International Trade on the European Social Model: in *The EU and the WTO – Legal and Constitutional Issues*. Oxford: Hart Publishing, 2003, s. 257.

² De Búrca G., Scott J. *The Impact of the WTO on EU Decision – making in The EU and the WTO – Legal and Constitutional Issues*. Oxford: Hart Publishing, 2003, s. 1.

- the question of extent to which and the way in which the EU institutions and organs seek to integrate the substantive obligations contained in the various agreements into their political and legislative processes
- the general principles and due process norms being developed by the dispute settlement bodies

This article is divided into two main parts concentrates primarily the most interesting questions outlined above. The first part considers briefly some of the points of comparison and contrast between EC and WTO. Also the relevance of these similarities and differences for the interpretation and effect of the respective norms of these institutions will be examined. The second part discourses about the domestic impact of WTO law. It is more than obvious, that EC law, WTO law and national law are in narrow contact everyday and the relation between them has to be clear. Czech Republic is fully influenced by both law systems, because it's membership in both organizations. Moreover EC are also the member of WTO, thus there exist many ways in which WTO norms and provisions are likely to influence and be integrated into the EC decision – making processes.

Then the question, of what status should WTO rules have in the ES legal order, is more then essential³. The answer to this question as to the question of direct effect of WTO law has been the subject of a number of judgments by the European Court of Justice and it will be examined by our colleagues. That is why we don't mention the issue of direct effect in our article.

International trade with goods of EC and third states called Common commercial policy belongs to the exclusive competence of EC and Czech Republic has to follow it's steps. Additionally, the EC's common commercial policy in the WTO continues to remain "power oriented" in several respects⁴.

II. Comparison and contrast between the ES and the WTO: correlation and influence

The EC and the WTO shares many obvious features, they are both organizations set up primarily to promote trade between states. Some authors consider EC and WTO even as constitutional

³ Peers, S. Fundamental Right or Politival Whim? WTO Law and the European Court of Justice in The EU and The WTO – Legal and Constitutional Issues, Oxford: Hart Publishing, 2003, str. 111.

⁴ Petersman E. U. European and International Constitutional Law: Time for Promoting „Cosmopolitan Democracy“ int the WTO in The EU and the WTO – Legal and Constitutional Issues. Oxford: Hart Publishing, 2003, str. 82.

entities with similar roots⁵. Other authors see as main shared sign, that the members of the ES and WTO have tied their hands in matters of trade policy and have tried to extend this tying to cover domestic policies that may affect trade⁶. Concerning ES role, they exist many exceptions from the MNF and NT duties due to the article XXIV GATT of course. Each organization has own legal framework.

The European Union, usually using the EC's legal personality, maintains a number of treaties which allow its partner's preferential access to the European single market and trading without customs in the custom union. We can observe significant tension between these treaties and their implementing regimes and fundamental WTO obligations as Most Favorite Nation rule and National Treatment. Also equal treatment and reciprocity in international trade is the fundamental principle of WTO law. The solution can be found, when it occurs a situation, which will make regional integration and specific bilateral trade relations possible, while yet at the same time protects international trade against unwelcome protectionist effects⁷. Different layers of governance play an important role in providing vertical checks and balances. While EC law monitors the distributive policies of Member States, this role is essentially assumed by WTO law with respect to the economic and social cohesion policies of the EU⁸. Furthermore the evolution in GATT/WTO law is similar to that in EC law, in the sense that firstly was created the approach to goods and then it was followed in the footsteps by the approach to services⁹.

On the other hand for EC and WTO is also characteristic difference. Given the economic experiences prior to the Second World War, the legal framework created by the founding fathers of the GATT focused on the elimination of discriminatory practices, either explicit border measures such as tariffs and quotas or domestic regulations and policies that discriminate against imports¹⁰. The original idea of GATT was that trade restrictions must not discriminate either

⁵ Walker, N. The EU and the WTO: Constitutionalism in a New Key in *The EU and the WTO – Legal and Constitutional Issues*, Oxford: Hart Publishing, 2003, str. 31.

⁶ Holme, P. The WTO and the EU: Some Constitutional Comparisons in *The EU and the WTO – Legal and Constitutional Issues*, Oxford: Hart Publishing, 2003, str. 62.

⁷ Bogdandy A., Makatsch T. Collision, Co-existence or Co-operation? Prospects for the Relationship between WTO Law and European Union Law in *The EU and the WTO – Legal and Constitutional Issues*, Oxford: Hart Publishing, 2003, str. 131.

⁸ Cottier, T., Hermann Ch. The WTO and EU Distributive Policy: the Case of Regional Promotion and Assistance in *The EU and the WTO – Legal and Constitutional Issues*, Oxford: Hart Publishing, 2003, str. 197.

⁹ Eeckhout P. Constitutional Concepts for Free Trade in Services in *The EU and the WTO – Legal and Constitutional Issues*, Oxford: Hart Publishing, 2003, str. 216.

¹⁰ Maduro M. P. Is There Any Such Thing As Free or Fair Trade? A Constitutional Analysis of the Impact of International Trade on the European Social Model in *The EU and the WTO – Legal and Constitutional Issues*, Oxford: Hart Publishing, 2003, str. 284.

against imports or between different GATT member states (National Treatment and Most Favoured Nation Treatment). During the time with the increasing success of the GATT in the elimination of discriminatory measures, the attention was focused on non- facially discriminatory policies and regulations thought to have negative impacts on trade. The idea is, if in necessary to use protective measures, then it should be tariff one as customs and the process of tariffication, any non – tariff measures as for example quantitative restrictions are ineligible. By contraries the customs are forbidden for the common markets of EC and if necessary, it can appear quantitative restrictions.

III. Domestic Impact of WTO Law

Following part of the paper addresses the position and legal impact of WTO law in domestic law. We may to observe this issue as first, from the point of view of international law, which shapes the prerogative of WTO law. And as the second, the domestic point of view in the EC law. The relationship of WTO law and domestic law (including EC law) is in full line with the principles of general public international law¹¹. This paper respects also the impact of WTO law on interpretation of domestic law.

First of all, it is the general public law, which interferes with the relationship of WTO law and domestic, eventually EC law. The principle of *pacta sunt servanda* is applied and noncompliance actions of any state shall be invoked. From the point of view of international law, the relationship is an easy one: the international legal order necessarily prevails over domestic law. This is well established, an all accounts. Primacy is a matter of logic as international law can only assume its role of stabilizing a global order if it supersedes particular and logical rules.¹² There are no doubts that from WTO law perspective with regard to WTO Agreement¹³, WTO legal system shall prevail over domestic law.

From the perspective of EC law, the EC Treaty is essential. Article 300, par 7 says that Agreements concluded under the conditions set out in this Article shall be binding on the

¹¹ Cottier T., Oesch M. : *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland – Cases, Materials and Comments*, Bern: Staempfli Publisher Ltd., 2005, str. 197.

¹² Cottier T., A Tudory of Direct Effect in Global Law, in A. von Bogdandy, Petros C.Mavroidis, Yves Meny, *European Integration and International Coordination, Studies in Transnational Economic Law*. The Hague, London, New York: Kluwer Law International, 2002.

¹³ Article XVI, par 4 requires unequivocally that each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations under the WTO agreements.

institutions of the Community and on Member States. According to the practice of ECJ, to the extent that international agreements have been concluded by the Community in its own competence, they became an integral part of EC law¹⁴.

WTO agreements are so called mixed agreements and they do not belong exclusively into the competence of EC, but they belong into the competence both the Community and also into competence of member state. Therefore also the member state is involved in implementation of such agreements and WTO law shall be concerned as an international agreement within each member state's legal order.

WTO law is an integral part of international law and when is examined its relationship with national law, two things need to be asked – the place of national law in WTO law and the place of WTO law in the domestic legal order¹⁵. A position of WTO law in hierarchy of EC law is situated between primary and secondary law, when induced by the Community in its own competence. Therefore WTO law shall be taken in account by Community authorities in the creation and interpretation of secondary law, as it is consequently endowed with the power to derogate national law. At last both EC and its member states are bound in their own rights, from the point of view of international law.

III. Conclusion

The ways in which Member States and EC institutional actors consider themselves bound to observe the provisions of WTO agreements, and the standards and norms to which those instruments refer, are more complex and subtle than the debates on direct effect and justiciability can capture.

WTO is a very broad multilateral organization while the EC is a geographically limited regional entity. Whatever the significance of the developments which emerged from the Uruguay round, with the move from GATT 1947 to GATT 1994 and the establishment of the WTO, it remains a fundamentally different entity from the EC. It is due to the objectives, political institutions, dispute resolution bodies and instruments which are profoundly different. Two fundamental

¹⁴ See also judgement C-181/73, R. & V. Haegeman v. Belgian State, 1974.

¹⁵ Van den Bossche P. The Law and Policy of the World Trade Organization: text, cases and materials. Cambridge: University Press, 2005, str. 60 - 75.

differences between the EC and the WTO in the legal institutional dimension and the policy - substantive dimension lie at the heart of many of the tensions created by the application of the rules and norms of the latter to the former.

According to T.Cottier and M. Oesch, actual significance of WTO law in the EC legal order is less matter of primacy status, which enjoys under Article 300, par.7 of the EC Treaty, but rather a matter of the ECJ's willingness to allow its enforcement. Above mentioned shall not create any sense of granting direct application in spite of the ECJ accepts jurisdiction over the WTO agreements as part of EC law.

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Kontaktní údaje na autora – email:

Kateřina Říhová – email: santaventino@centrum.cz

Martin Orgoník – email: Martin.Orgonik@law.muni.cz